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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

AMADO MARTINEZ-FUERTE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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After the petition for a writ of certiorari in this case was filed, the Court decided *United States* v. *Ortiz,* No. 73-2050, and *United States* v. *Brignoni-Ponce,* No. 74-114. In *Ortiz,* the Court held that warrantless searches of private vehicles for aliens at Border Patrol traffic checkpoints removed from the border and its functional equivalents, if conducted without probable cause or consent, violate the Fourth Amendment. In *Brignoni-Ponce,* the Court held that warrantless roving patrol stops of vehicles in the border area to inquire about the citizenship of the occupants are permissible under the Fourth Amendment

only if the officers "are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country" (slip op. 11).

The Court expressly left open in those decisions the questions "whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens" (*Ortiz,* slip op. 6, n. 3) and whether a judicial warrant authorizing stops or searches may properly issue "based on information about the area as a whole, in the absence of cause to believe that a particular car is carrying concealed aliens" (*ibid.;* see also *Brignoni-Ponce,* slip op. 8–9, n. 7). Both questions are presented by the petition in this case, and both are of continuing importance to the Border Patrol's enforcement effort.

Checkpoint stops of vehicles for the purpose of brief inquiry concerning the occupants' right to be in the United States are the single most important Border Patrol traffic operation, in terms both of apprehending illegal entrants and of deterring unauthorized entry. Although a brief stop and inquiry cannot accomplish all the enforcement objectives that would be achieved by a limited search for concealed aliens, many illegal entrants are discovered riding in the passenger compartments of vehicles, and an experienced officer's observations at the time of a stop frequently give him probable cause to believe that the

vehicle does contain concealed aliens (see *Ortiz,* slip op. 6–7).[1]

The routine stops involved in the present case were made pursuant to a judicial warrant. As we stated in the petition (p. 11), however, the validity of the warrant need not be reached if, as we contend, the stops were valid regardless of the warrant. With respect to that threshold question, the Fifth Circuit recently held that there is "no constitutional dereliction in stopping vehicles at [a] permanent checkpoint for the purpose of determining the occupant's citizenship." *United States* v. *Santibanez,* No. 74–3382, decided August 11, 1975. That decision, like the Tenth Circuit's decision approving warrantless checkpoint stops (*United States* v. *Bowman,* 487 F. 2d 1229), conflicts with the Ninth Circuit's decision in the present case and in *United States* v. *Esquer-Rivera,* 500 F. 2d 313.

The Border Patrol is currently operating its checkpoints within the jurisdiction of the Fifth and Tenth

[1] The effectiveness of the stop procedure is demonstrated by the results at the San Clemente checkpoint during the nine-month period when it was operated pursuant to warrants authorizing such stops. See Pet. 13, n. 9. Prior to this Court's decisions in *Almeida-Sanchez* and *Brignoni-Ponce*, the Border Patrol traditionally supplemented its checkpoint operations by the use of roving patrols on secondary or bypass roads. While the absence of routine roving patrols makes it easier for illegal entrants to evade the established checkpoints, the nine-month statistics at San Clemente, compiled at a time when roving patrol operations were not being used, indicate the continued effectiveness and importance of checkpoint stops as an immigration law enforcement method.

Circuits by stopping vehicles without warrants for purposes of inquiry. Under the Ninth Circuit's decision in the present case, however, checkpoint stops may not be made even with a warrant, and no routine traffic checking operations have been conducted at the checkpoints within that jurisdiction since the expiration of warrants that were outstanding on the date of the decision.

Accordingly, the issues left unresolved by the decisions in *Ortiz* and *Brignoni-Ponce* merit review by this Court.

ROBERT H. BORK,
Solicitor General.

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